IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-000001

BETWEEN	**RICHARD and RENEE SELL** Claimants
AND	**KENNETH HARRIS** First Respondent
AND	**AUCKLAND CITY COUNCIL** Second Respondent
AND	**KEVIN TRIBE** Third Respondent
AND	**GARY SMITH** Fourth Respondent

Hearing:	20, 21, 22 and 23 April 2009
Appearances:	D Carden, for Claimants P Dalkie, for First Respondent F Divich, D Heaney SC and N Stone, for Second Respondent S Roe, for Third Respondent No appearance by Fourth Respondent
Decision:	13 May 2009

FINAL DETERMINATION
Adjudicator: P McConnell

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INTRODUCTION

[1] Renee and Richard Sell are the owners of a home at Rukutai Street, Orakei. In 1996 they engaged the first respondent, Kenneth Harris, to construct the house. When the house was completed it was not watertight. Moisture ingress has occurred causing extensive damage to the cladding and wooden framing. As a consequence remedial work has been carried out which included a complete reclad.

[2] Mr and Mrs Sell brought this claim against the builder, Kenneth Harris, his assistant, Kevin Tribe, the concrete layer, Gary Smith and the Auckland City Council, the territorial authority who issued the building consent and carried out several inspections during construction. They are claiming $285,160.88 which includes the cost of repairs (less a deduction made for betterment) of $200,459.85 including professional and other fees together with $33,000 for stigma, interest paid on loans obtained to carry out the remedial work of $11,701.03 and general damages of $40,000.00.

BACKGROUND

[3] Mr Sell purchased the property at 99 Rukutai Street in 1990. Mr and Mrs Sell's intention was always to construct a home on the site when they could afford to do so. They however discovered that there were storm water access issues in relation to the site, which were potentially expensive to overcome. They accordingly considered whether it would be more economic to sell the section rather than to develop it. The issues to do with storm water were primarily related to the cost of moving the storm water from the site. These issues are not a contributing factor to the house leaking.

[4] The storm water issues were however resolved in an agreement with the Council and in 1996, Mr and Mrs Sell engaged a draftsman, Robert Medemblik, to design a house for them. Plans and specifications were completed and on 14 August 1996 Mr and Mrs Sell applied to the Auckland City Council (the Council) for a building consent. A building consent was issued on 10 December 1996.

[5] Mr and Mrs Sell sought quotes for construction from three different builders. One of those was Kenneth Harris, the first respondent who had been recommended to them by their friends Christine and Murray Freestone. Mr Harris was Mrs Freestone's brother-in-law.

[6] Mrs Sell first met Mr Harris on 22 August 1996 and as a consequence of the discussions on that evening Mr Harris agreed to build the home for Mr and Mrs Sell for $25,000.00. Mr and Mrs Sell would pay for all materials and pay any subcontractors direct. No detailed written contract was signed but Mr Harris subsequently signed the notation in Mrs Sell's analysis book confirming the contract price of $25,000.00 inclusive of GST.

[7] Building work commenced on 17 September 1996 and was largely completed by early January 1997 with Mr and Mrs Sell moving into the house in January 1997. The driveway was laid in late January 1997.

[8] Mr Harris engaged Mr Tribe to assist him with the building work on site. Arrangements were made between Mr Harris and Mrs Sell for Mrs Sell to pay Mr Tribe directly, on the basis of timesheets confirmed by Mr Harris. The payments made to Mr Tribe were to come out of the $25,000.00 contract price. This arrangement was made as Mr Tribe was not GST registered and accordingly GST

would be saved on the part of the $25,000.00 that related to Mr Tribe's income if Mrs Sell paid him directly.

[9] During the course of the construction, Mr Harris made a trip to India and was accordingly absent from the construction site for approximately two and a half weeks. Mr Tribe continued to work on the property during Mr Harris' absence. By the time Mr Harris left, the external construction was largely completed with Mr Tribe mainly undertaking internal fit outs during Mr Harris' absence.

[10] There were four or possibly five Council inspections that took place while Mr Harris was engaged on site. Mr Harris arranged these inspections and they included an inspection of fittings, inspection of the subfloor, inspection of pre-line, inspection of post-line, and sanitary storm water inspection. All these inspections were passed and no issues were noted at the time.

[11] Mr Harris completed his work on site probably prior to Christmas 1996. There is some dispute as to whether he was on site up to the middle of January, but I do not believe that this issue is significant in terms of the matters in dispute in this claim.

[12] A final inspection was not arranged at that time as Mr and Mrs Sell, for financial reasons, were not completing the ensuite bathroom or installing the handrails to the balcony balustrades until later. Mrs Sell contacted the Council at the time and checked the time limit for arranging the final inspection and for obtaining a Code Compliance Certificate (CCC). The Council advised that a delay in finalising the CCC would not be an issue.

[13] After installing the handrail in 1998, Mr Sell contacted the Council to arrange an inspection in order to ensure that the handrail would pass inspection. At that stage the ensuite still needed to be completed.

[14] The Auckland City Council inspector noted nine items to be completed. Mr Harris was contacted and he came out and attended to four of the nine items. For three of the remaining items, Mr Harris advised they would need to engage a plumber to do the work, which was done. As mentioned previously, Mr and Mrs Sell did not have the money to complete the ensuite at that stage which was the final item. In addition the landscaping needed to be completed which required a retaining wall on the east edge of the section.

[15] By October 1999, all items other than the ensuite had been completed and a further inspection was arranged. Apart from the ensuite, all previous issues had been resolved but three additional items were noted as outstanding.

[16] By February 2004 the ensuite was completed and a second final re-check was organised with the Council. However, by this stage the Council had changed its policy in relation to monolithic plaster houses. The final re-check noted "re-check all OK monolithic plaster Council to contact owner". On 26 May 2004 a cladding inspection was carried out and failed because of the lack of cavity and the ground level issues. A notice to rectify was issued in June 2004.

[17] In February 2005 the claimants engaged Prendos Limited for independent advice. They then applied to the Weathertight Homes Resolution Service in April 2005 for an assessment report. Both of these reports concluded that their home was a leaky home with a number of defects, which required remedial work.

[18] Mr and Mrs Sell consulted Pat O'Hagan and engaged him to provide advice on remedial matters. They decided to proceed with the remedial work before progressing their claim in the Tribunal. The

respondents were however notified and given an opportunity to inspect the dwelling before and during the remedial work.

[19] Remedial work was carried out in 2008. In addition to the work required to remedy the defects caused by leaking, Mr and Mrs Sell also slightly enlarged the floor plan of the house by changing wall angles. From the total costs of the work they have deducted the amount of the work that was not required for remedial purposes. In addition, rather than re-cladding with a similar material they had reclad with cedar weatherboards.

THE DWELLING AND ITS PROBLEMS

[20] The building was constructed with a treated timber wooden framework. The cladding used for the exterior walls was a James Hardie building product lightweight cladding, giving the appearance of a monolithic finish, known as Harditex. James Hardie provided a technical information catalogue with its product which was required to be followed by those involved in the dwelling's construction. The relevant catalogue produced in evidence was published in February 1996. It contains detailed information as to how the product is to be installed and fixed to other structural components. Harditex was an alternative solution with an appraisal certificate (no. 243) issued by the Building Research Association of NZ. That body had appraised Harditex and concluded that if the product was installed in accordance with the February 1996 technical information, it would comply with clauses B1, B2, E2 and S2 of the Building Code.

[21] At the heart of this claim, as is the case with most leaky home claims, is the fact that wood exposed to water will tend to rot. It is not disputed that the entry of water into this house has resulted in large-scale problems both in terms of rotting to the wooden framework and damage to the cladding material. It is also not

disputed that the extent of the damage is such that a complete reclad was the only possible solution. The issues therefore in this case are whether Mr and Mrs Sell can show that how and why this happened was the responsibility of the respective defendants and whether the respondents breached any legal duties they owed to Mr and Mrs Sell.

[22] The technical background to these claims are now well understood. Section 7 of the Building Act 1991 (the Act) requires that all building work for residential properties, such as the subject dwelling, comply with the Building Code which is part of the regulations enacted under the Act. Section 32 of the Act requires building work to be done in accordance with a Building Consent, and the local authority, in terms of section 43 of the Act, shall only issue a CCC if it is satisfied on reasonable grounds that the building work complies with the Building Code.

[23] The Building Code sets functional and performance requirements which all building work must meet. The relevant clauses of the Building Code for this claim are clauses B2 (durability), E1 (surface water) and E2 (external moisture).

[24] Throughout the building work the local authority's obligation under the Act is to carry out inspections to ensure that it is satisfied on reasonable grounds that the certified work complies with the Building Code. At the completion of the building work, provided the Council is satisfied that the work complies with the Building Code, a CCC can be issued. In this case the CCC for the subject dwelling was only issued after the remedial work was carried out as for reasons already outlined.

THE ISSUES

[25] The issues to address in determining this claim are:

(a) The defects to the dwelling and the contribution of those defects to the damage
(b) The cost of repairs
(c) Whether the claimants are entitled to general damages
(d) The role of Mr Harris and Mrs Sell in the construction process and the effect this has on the various respondents' liability
(e) The liability of each respondent for the damage and consequent costs
(f) Contributory negligence

DAMAGE TO THE DWELLING AND ITS CAUSES

[26] Mark Hadley, the assessor, Patrick O'Hagan, the claimants' remedial expert and Kelvin Walls, the first respondent's expert gave their evidence concurrently on the issues of the defects to the dwelling and the subsequent damage. The clarity and openness with which they discussed issues and gave evidence is appreciated and assisted the Tribunal and the parties in understanding the contributing issues to the dwelling leaking. All three experts were careful to address issues in accordance with what they have seen in their investigations. All had considerable knowledge of building processes, potential contributing causes to leaky homes and also of both Council and building requirements at the time the house was built.

[27] Whilst Dr Walls' evidence was clear, careful and helpful when considering individual defects, his evidence when attributing responsibility for those defects was less helpful in the circumstances of this particular case. For example, Dr Walls considered that the Council had responsibility for building defects but not necessarily the

builder. The reason for that opinion is that he believed builders built in accordance with what the Council allowed them to get away with. His conclusion therefore was that it was the Council's responsibility if poor building practices were adopted. Whilst I accept this may well have some accuracy in relation to determining the causes for the leaky home crises, such an explanation does not and cannot remove responsibility from a builder for shoddy or negligent building work. Such evidence can give, at least, the perception of advocacy on behalf of a party. These comments however do not detract from the value of Dr Walls' evidence in relation to the defects and their contribution to the dwelling leaking.

[28] All the experts agreed that this was not a claim involving systemic failure but that a number of individual issues contributed to the dwelling leaking. Some of the causes of water leaking, in addition, could not be considered to be defects as they were in accordance with standard building practices of that day. The following defects or causes were identified by one or more of the experts in their investigations.

Lack of ground clearances

[29] There was general agreement that the lack of ground clearances was a major contributing factor to the dwelling leaking. Whilst Mr O'Hagan had classified lack of ground clearances under the heading "Incorrect Installation of Exterior Cladding", this is more appropriately dealt with as a separate defect. The main issues to do with ground levels relate to the driveway and to the ground levels on the western elevation next to the garage wall and also the south wall allowing moisture ingress due to capillary action into the timber frame and bottom plate.

[30] Dr Walls also believed ground levels were a significant contributing factor on other elevations. Mr Hadley and Mr O'Hagan

considered ground levels would only be a minor consideration on the other walls. They noted that the moisture levels were only high around the bottom plate at the corners of the dwelling on other elevations and not consistently along the walls. If the ground levels were a significant contributing cause they would have expected there to be higher moisture readings along the walls as well.

[31] I accept on the basis of the evidence that ground clearances were a significant contributing factor to the dwelling leaking particularly in relation to the driveway and the rear of the garage. In addition they were a contributing factor on other elevations.

Balcony handrails and parapet

[32] The dwelling has two decks, one on the north elevation and one on the east elevation. All experts agreed that moisture had penetrated the timber framing and caused damage. They also agreed that the cause of the problem was threefold: firstly the way the handrails were top fixed into the decking wall, secondly the lack of membrane in the decking wall, and thirdly the lack of slope to the top of the decking walls. The damage caused by this defect was largely confined to the decks themselves as the decks in both locations were semi-detached and were not on top of other areas in the dwelling.

Lack of saddle flashings or appropriate sealing to parapet cladding junctions & deck framing direct fixed to cladding

[33] All experts agreed that a contributing cause to the dwelling leaking, particularly on the north and east elevations, was the manner in which the decking handrail was attached to the wall. No saddle flashings had been used and there was inadequate sealant. This allowed moisture ingress through the fixing point into the timber

framing. In addition, the deck framing being direct fixed to the cladding allowed moisture to ingress into the timber framed walls through the bolt fixings. All experts however agreed that whilst both were causes of water entry, the building methods used were relatively standard building practices at the time. They agreed that saddle flashings were not commonly used at the time the house was built and were not specified in the technical literature.

[34] All the experts also agreed that the direct fixing of the deck into the walls was a contributing factor. They however agreed that the direct fixing of decks, whilst not best practice, was relatively common practice at the time of construction.

Incorrect installation of cladding

[35] Mr O'Hagan considered that the cladding not being painted in some areas was a defect. Whilst this was accepted by Mr Hadley and Dr Walls, they both said they saw no evidence of leakage as a result of this defect. Mr O'Hagan thought this might be a contributing factor to the leaking in the garage area. I would conclude that if this defect did contribute to the dwelling leaking, it was minimal.

[36] Mr O'Hagan also believed that the joints being incorrectly finished was a defect which resulted in water ingress. Again, the other experts accepted that this was a defect but not a dominant cause of leakage or damage.

[37] In relation to the north east and north west corners of the dwelling, Mr Hadley considered that the incorrect fixing of sheets resulting in cracked cladding and inter-storey issues was a far more dominant factor in the leaking than the ground levels. In his report he also refers to a number of active defects in the installation of the cladding. Mr O'Hagan also referred to the fixing of the cladding contributing to the dwelling leaking.

[38] Dr Walls accepted that there was cracking in the cladding causing water ingress but suggested this was because the cladding material used was inappropriate for the site and the lack of a concrete perimeter foundation wall. The other experts did not accept that either the site or inadequate foundations contributed to the dwelling leaking. Mr O'Hagan noted that Dr Walls in his report had referred to stucco cladding and Harditex was not stucco. He accepted Dr Walls' comments were correct in relation to stucco but not Harditex.

[39] After assessing all the evidence on this issue I conclude that poor workmanship and planning in the fixing of the cladding and the subsequent texture coating has been a significant cause of the dwelling leaking. There is little evidence to establish the site or foundations were contributing factors. Harditex was approved for the conditions that applied on this site including the types of foundations used.

Lack of control joints and failure of horizontal joints

[40] The experts identified both the absence of vertical control joints and the failure of the horizontal joints as defects. All experts agreed that the technical literature required control joints and these were absent. Dr Walls saw no evidence indicating that the failure to include vertical control joints had contributed to the dwelling leaking. Mr Hadley and Mr O'Hagan accepted that whilst they were defects, if they did contribute to the leaks it would only be a minor contribution.

[41] The far more significant contributing factor was the horizontal joints. The experts however accepted that horizontal jointers had been included and were largely constructed in accordance with the technical literature. Mr O'Hagan however noted that there were some deficiencies in the installation, such as no sealant on the ends

of the horizontal jointer and no gap between the top and bottom fibre cement sheets at the horizontal jointer. It is possible that there may have been a gap when installation took place, but due to shrinkage, the gap was no longer there. Dr Walls said he had seen no evidence.

[42] I accept that the horizontal jointers have contributed to the dwelling leaking. This is in part due to the failure of the horizontal jointers and also because they have not been formed correctly. I accept both Mr Hadley and Mr O'Hagan's evidence that the incorrect formation of the horizontal jointers was a contributing factor to the dwelling leaking.

Building paper under head flashings

[43] Mr O'Hagan gave evidence that in two to three areas, building paper had been installed under the head flashings. As a consequence, when water got in from above, it kept going down into the framing rather than being diverted out by the building paper. Mr O'Hagan saw this as a contributing but not a major cause. Dr Walls accepted this was a defect but had seen no evidence that it led to damage. Mr Hadley also considered it to be an inactive defect. I accordingly conclude that whilst this was a defect in the construction, its contribution to the dwelling leaking was minor.

Bottom of cladding does not have the required in-seals

[44] All the experts accepted that the James Hardie literature required in-seals to be installed in the bottom cladding. This would not apply to the wooden floor area of the dwelling but only to the garage floor. Mr Hadley and Mr Walls, whilst accepting there were no in-seals, believed this would not have made a difference and all experts agreed that the gap was more significant than the absent in-seals. I accept that there was an inadequate installation of in-seals

and that this is contrary to the technical literature. I however accept that this has not contributed to the dwelling leaking.

Defects in window installation

[45] Mr Hadley's report lists incorrect window installation as a contributing factor to the dwelling leaking. He observed lack of sealant behind the aluminium jamb and also deficiencies in the head and sill flashings. All experts however accepted that at the time this dwelling was built, there was no requirement for jamb and sill flashings. Dr Walls said he had seen no evidence of damage caused by window installation. Mr Hadley in his report noted that there were some high moisture readings around the windows but the majority were in the normal range. He did not pick up water ingress around the windows as being a significant issue. He noted that the Tribunal would need to rely on Mr O'Hagan's evidence in this regard. Mr O'Hagan's evidence is that there was decay to the timber around a number of the windows which suggested water ingress around the windows.

[46] I accept there has been some deficiencies in the installation of the windows. These deficiencies were minor contributing causes particularly as the lack of sill and jamb flashings cannot be considered as defects as they were not required at that time.

Decorative Weatherboards

[47] The experts accepted that the decorative weatherboards being fixed to the unsealed fibre-cement cladding prior to texture coating was a defect. They did not agree as to whether it caused any damage. Mr O'Hagan stated that it could be a contributory factor and Mr Hadley, in his addendum report, included it as an issue under the heading of future likely damage. I accept it is a defect and whilst there was little evidence that it had caused damage, it would most

likely have caused damage in the future if it had not been repaired. I do not accept Mr Harris's evidence that Mrs Sell arrived with a bucket of sealant for them to apply before affixing the decorative weatherboards. The invoice for the weatherboards is dated 10 December 1996. Mrs Sell was in hospital from 10 to 16 December, and again from 18 to 20 December 1996. She was very unwell during this period and not on site. She therefore could not have done this.

Maintenance

[48] Dr Walls considered that lack of maintenance was the predominant contributing cause to this dwelling leaking and if regular and careful maintenance had been carried out the dwelling would not have leaked. Mr O'Hagan and Mr Hadley disagreed. Mr Hadley noted that Dr Walls had not visited the property until approximately three years after Mr Hadley's first visit. Mr Hadley noted that during that time, little if any, maintenance had been carried out because the claimants knew that they were going to have to reclad the building. Because of that, there had been significant deterioration due to lack of maintenance but he did not consider this to be a contributing factor to the cost of the remedial work.

[49] Counsel for Mr Harris, Mr Dalkie, in his submissions at the end of the hearing, stated that Mr Hadley had accepted that the lack of maintenance was a significant issue. I have re-listened to those parts of the hearing where maintenance was discussed and do not accept Mr Dalkie's submission. Mr Hadley specifically ruled out maintenance as being a contributing factor and said that he did not believe that additional maintenance would have prevented the problems. He noted that this had been a new house and there was no reasonable expectation that the owners would need to carry maintenance over and above what they did, which was clean the house down every 18 months to 2 years. He also noted that if you

look at the leaks list and at the consequential damage, more maintenance would not have made any significant difference.

[50] Mr Hadley's opinion was that it was questionable whether more stringent inspections and filling of cracks as soon as they appeared would have confined or reduced the damage. Mr O'Hagan also said that given this house was built with treated timber, the amount of damage was such that it was obvious that the house must have leaked as soon as it was built.

[51] I accordingly do not accept that the lack of maintenance was a key contributing cause to the dwelling leaking. Any regular maintenance work that the claimants could reasonably have undertaken would not have addressed the key causes to the dwelling leaking. Whilst more proactive maintenance after 2004 would have reduced some of the damage, a complete reclad was inevitable as was the adjustment of ground levels in key areas. I therefore conclude that the lack of maintenance has not caused the damage or significantly increased the cost of the remedial work.

Summary and conclusion on defects

[52] This claim is somewhat unusual in that the cause of the damage is a succession of isolated and limited defects rather than a complete systemic failure. All of the experts had difficulty in concluding which defects, or group of defects, tipped the remedial work from targeted repairs to a full reclad. Attributing damage to a specific cause was almost impossible, as it was generally a combination of overlapping causes that contributed. In addition there were a number of other contributing issues which, while causing leakage and subsequent damage, were constructed in accordance with the accepted building practices of the day.

[53] There was general agreement however that the main causes of damage to the dwelling were the decks and handrails, the ground clearances and the fixing of the cladding including the horizontal jointers. The other contributing factors included the building paper being installed under the head flashings and some minor defects in window installation. I do not however accept that the lack of maintenance was a contributing factor nor the nature of the site on which the house was built. None of the experts at the hearing raised the site as a contributing issue and there was no reliable evidence that the cladding material was unsuitable for the site.

QUANTUM OF CLAIM

Remedial Works & Betterment

[54] All the parties agreed that a complete reclad was the only acceptable solution. Dr Walls on behalf of the first respondent had initially submitted that a partial reclad may have been appropriate. He however accepted that a reclad was necessary due to wear and tear, lack of maintenance and change in culture, particularly the change of territorial authority requirements.

[55] Six experts gave their evidence concurrently in relation to the remedial costs. These experts were Mr O'Hagan, Mr Vogels and Mr Malcolm Smith for the claimants, Dr Walls for the first respondent, Mr Ewen for the second respondent, and the WHRS assessor, Mr Hadley. The claimants acknowledge that when the remedial work was done they also did additional work which could be considered as betterment. This work included closing the porch area to create a study and also removing some of the angles primarily on the north elevation. The effect of this work was that the interior floor space of the dwelling increased but the exterior wall slightly decreased in dimensions. Mr O'Hagan and Mr Vogels also noted that the removal

of complex angles reduced the complexity of the remedial work and probably made it slightly cheaper.

[56] The claimants have made deductions from the cost of the work to cover the work associated with the extensions and other matters which were not necessitated by the leaks. None of the parties, or their experts, disputed the calculations for this additional work and they accepted that the amount being claimed for the remedial work was fair and reasonable with the exception of three areas. Mr Ewen submitted that there were in three areas betterment, which had not been appropriately allowed for in the claimants' claim. These were:

- Painting costs
- Substitution of cedar weatherboards as cladding material
- Architects and associated fees

[57] The claimants conceded that painting costs should be deducted from the amount claimed as the house had been due for a repaint at the time the weathertightness issues became apparent. They accordingly agree that the exterior painting cost of $10,773.56 should be deducted from the amount being claimed.

[58] Mr Ewen on behalf of the Council also believed that a scaffolding allowance should also be deducted from the amount claimed being the estimation of the scaffolding costs required for the painting work. The claimants opposed any deduction for scaffolding. Mr Vogels gave evidence that any scaffolding used by the painters was his scaffolding and that it was not on site for any longer than what was required for the building work. He also noted that the amount of scaffolding, if any, that would have been required to paint the dwelling would most likely have been provided by the painting company and built into the painting costs.

[59] On the basis of the evidence provided, I find that a $2,000.00 reduction for scaffolding would be an academic or theoretical cost only. There was no additional scaffolding cost incurred that related to the painting. Accordingly it is not appropriate for a further deduction to be made to the remedial amounts claimed for this item.

[60] There was also a dispute between the experts as to the costs of cedar weatherboard as opposed to a monotek fibre-cement cladding. Mr Ewen submitted that an amount of $7,829.00 should be deducted for betterment being the additional cost of cedar weatherboard over monotek. Mr O'Hagan however submitted that the complete system cost of cedar weatherboard as opposed to monotek were similar, if one took into account the additional cost for painting and plastering for the monotek product.

[61] After discussion between the experts, there was general agreement by Mr Hadley, Mr O'Hagan and Mr Ewen that when comparing the complete system costs, cedar weatherboard cladding was slightly more expensive than the monotek cladding. The difference in costing, and why a further amount for betterment should be allowed, according to Mr Ewen was because he had deducted the painting costs from the system when comparing prices. He had done this because painting in itself was betterment and should not be taken into account.

[62] Part of the argument on this issue is whether a theoretical or an actual cost should be taken into account when comparing systems. I accept on the evidence presented that there is only a slight additional cost when total systems are compared for cedar weatherboards over monotek. This additional cost however would have been more than accounted for by the fact that the exterior wall area of the dwelling had reduced by approximately 10 square meters as a result of the additional work for which Mr and Mrs Sell are not claiming.

[63] When homeowners are making decisions in relation to cladding materials and determining whether one type of material is of similar price to another and whether there is any element of betterment incurred, it is appropriate that they take into account the cost of the full system. I accordingly conclude that there should not be a further deduction made for betterment in relation to substituting cedar weatherboard for monotek.

[64] The final area of betterment related to appropriate deductions to be made to expert's fees for personal variations required by the Sells. There was agreement between the experts that expert fees claimed should be reduced by $1,181.25 as this amount related to the work done for the personal variations. Mr Ewen submitted that there should be additional deductions made for the additional matters of betterment if they were accepted. There was general acceptance however that painting costs were not taken into account in the architectural fees and accordingly the only additional betterment issue would be the cedar weatherboards. As I have concluded there would be no deduction for the weatherboards. There should be no further deduction of experts' fees than the $1,181.25 agreed.

[65] Accordingly the total amount claimed for remedial work which was originally $200,459.85 should be reduced by $10,773.56 being the cost of painting and a further $1,181.25 for the experts' fees relating to the additional work. The claimants have accordingly established remedial work to the value of $188,505.04.

Stigma

[66] Mr and Mrs Sell are claiming $33,000.00 for stigma. The basis of this claim is that even though remedial work has been completed there is still a stigma attached to the property, as a prospective purchaser would pay a lesser price due to the knowledge

that it has been a leaky home. Mr and Mrs Sell submit that the market and in particular potential prospective purchasers would take into account the fact that the house had in the past been a leaky home and accordingly the house would achieve a lower price when sold.

[67] James Clark, a registered valuer, had been instructed by Mr and Mrs Sell to value the property first in April 2006 and then subsequently after completion of the remedial work. His opinion was that a discount of approximately 5-10% of the value of the property would not be unreasonable when assessing the potential market value of this property given the fact that it had been a leaky home. His opinion was that there is a market resistance to homes which have been leaking and damaged even though they have been repaired. He believes that market resistance is reflected in lower prices being obtained.

[68] Mr Gamby, on behalf of the second respondent, however expressed an opinion that stigma in relation to leaky homes can more significantly be attached to the type of construction. His submission is that all monolithically clad homes attract a stigma regardless of whether they have been leaking or not. This point was acknowledged by Mr Clark who further acknowledged that any stigma attached to a repaired home could be less than that attached to a monolithically clad home that had not been repaired.

[69] Mr Gamby produced an article by Dr Michael Rehm of the Department of Property at the University of Auckland entitled "Judging a House by its Cover: Leaky Building Stigma and House Prices in New Zealand" (2009) 2(1) International Journal of Housing Marbets and Analysis, 57. In that paper Dr Rehm's analyses sale details of housing over a number of years in accordance with cladding materials. Based on his analysis of that information, he concludes that monolithically clad homes in general attract a stigma.

He further concludes that another avenue towards reducing leaky home stigma is appropriate remedial design. He states at p 74 that:

> "It is possible for a monolithic-clad property to recoup some of the stigma value loss if it is re-clad with a different material and the new cladding system features a vented cavity to mitigate against future weathertightness problems."

[70] It would be unrealistic to conclude that there would be no diminution of value for a leaky home that has been repaired. The difficulty claimants face with stigma claims is however twofold. Firstly, evidence suggests that all monolithically clad homes may attract a stigma or reduction in value because of the cladding material itself regardless of whether they leaked. It is the claimants who have in this case chosen to build, or in other cases chosen to purchase properties, which are monolithically clad.

[71] The second problem facing claimants is one of proof of actual loss. There are a number of factors that affect the purchase price or value of properties. In a rising market, or where there is a shortage of homes, an appropriately remediated formerly leaky home may attract very little, if any, stigma or reduction in value. However, in a depressed market this factor may have more relevance and mean a lower price could be obtained. Until such time as the claimants sell their property at a loss it is difficult to establish loss and therefore very difficult to conclude that there is any loss due to stigma.

[72] In any event, the claimants have significantly reduced any potential stigma damage by changing the cladding material. I accordingly conclude that the claimants have failed to establish any diminution in value of their property due to stigma and this part of the claim is therefore dismissed.

Interest

[73] The claimants are seeking $11,701.03 being interest accrued at the rate of 6% on money borrowed through until 30 April 2009. It was acknowledged that this amount should be reduced by $1,053.09 being the interest accrued on the money borrowed to undertake personal adjustment. This accordingly reduces the amount of the claimants' interest claim to $10,647.94. Added to this however is a sum of a further $402.83 being interest from 1-13 May 2009, the date of this determination, on remedial costs established of $188,505.04. There was no dispute in relation to the interest claimed other than the adjustment for personal costs. The amount of interest of $11,050.77 has accordingly been established.

General Damages

[74] The claimants are seeking $40,000.00 in respect of emotional harm, stress and anxiety flowing from their discovery that they owned a leaky home. To support their application, Dr Grant, Mrs Sell's general practitioner, gave evidence of an increase in referrals for migraines since the issues first became apparent. It was also noted that Mr and Mrs Sell lived in the property while the remedial work was being carried out. This caused considerable discomfort and distress on the family. Clearly many families in their situation rent alternative accommodation and include those rental costs as part of their claim.

[75] As indicated at the outset of the hearing, the Tribunal is guided by the High Court in relation to the general damages awarded. The High Court has awarded general damages to successful plaintiffs in recent leaky building claims of between $20,000.00 and $25,000.00 for each owner/occupier claimant.

[76] I accept that Mrs Sell has had health issues as a direct result of the stress of dealing with the fallout of the leaky home issues. In addition, I accept the family has undergone considerable discomfort, upheaval and distress in living in the home in less than ideal circumstances while the remedial work was being carried out. It is accordingly appropriate that general damages at the upper end of the general range be awarded and I accordingly award general damages of $25,000.00 jointly to Mr and Mrs Sell.

THE ROLES OF MRS SELL AND MR HARRIS

[77] Central to the liability issues in this case are the respective roles of Mr Harris, the first respondent, and Mrs Sell, the claimant, in relation to the construction of the property. Mrs Sell submits that she contracted with Mr Harris to carry out the building work and to supervise the construction of the property. Her evidence was that she had sought other quotations and that her friend, Christine Freestone, recommended her brother in-law, Mr Harris, and arranged a meeting. Mr Harris agreed to meet or better the cheapest quote of $25,000.00 that Mrs Sell had obtained. He advised Mrs Sell that she could save money if she was willing to do the running around including contacting subcontractors, being responsible for all the bookwork and financial matters including paying contractors directly.

[78] Mrs Sell's evidence is that she agreed to do all this but that Mr Harris was contracted to build and supervise the construction. She accordingly took responsibility for the administration side of engaging the subcontractors including arranging for them to be on site and paying them but that other than this Mr Harris was responsible for all on site supervision.

[79] Mr Harris however submits that he was only ever engaged as a labour-only contractor and that Mrs Sell was the head-contractor

and project manager. His submission is that he can only be liable for building work that he actually carried out and that he had no responsibility for supervision.

The Evidence

[80] To a large extent, the decision on this point requires an assessment of the credibility of the evidence of both Mrs Sell and Mr Harris. Mr Dalkie made various comments in his closing submissions about the lack of credibility and inconsistency in Mrs Sell's evidence. I did not find this to be the case. Mrs Sell answered extensive questioning and was clear and consistent in her answers. She was however, as was Mr Harris, understandably hesitant to answer loaded questions without some clarity as to what the questioner meant by various words and expressions used. Mrs Sell's answers to questions asked was consistent with her witness statement and consistent with the diary notes that she took at the time.

[81] In addition, it was evident that Mrs Sell had a clear memory of certain key aspects in relation to the construction of the house. Where she could not recall or remember, she was willing to admit to this. It is reasonable that Mrs Sell would have a better recollection and memory of events than Mr Harris. This is the only house Mrs Sell had built whereas Mr Harris has spent many years constructing houses.

[82] I found Mr Harris's evidence to be less consistent with the evidence he gave at the hearing contradicting his witness brief on several issues. Some examples of this are:

- In his brief Mr Harris says that he first met Mrs Sell on site. In the hearing he acknowledged the meeting did not take place on site but his memory then was it took place at the Freestones.

- In his witness statement, Mr Harris stated that Mr Tribe had arranged directly with Mrs Sell that she would pay him periodic amounts for his work and that Mrs Sell paid Mr Tribe directly. In his evidence Mr Harris accepted this was not how it happened. He agreed that he arranged with Mrs Sell for her to make the payments out to Mr Tribe. Mr Tribe gave Mr Harris his invoices each week, Mr Harris checked them off and gave them to Mrs Sell. Mr Harris then signed for them in Mrs Sell's analysis book, and Mrs Sell gave Mr Harris the cheque which he gave to Mr Tribe.
- In his witness statement, Mr Harris stated that he did not arrange any of the Council inspections and that Mrs Sell arranged all of these. In his evidence at the hearing, he accepted that he had arranged at least the first four inspections. He acknowledged that it was his name and/or phone number that was beside the Council's entry and that it was more likely than not that he was responsible for these.

[83] In addition, Mr Harris on occasions had difficulty answering specific questions with a direct answer. Frequently when he was asked about a specific incident his response was what would usually happen and not necessarily what did happen. He was clear and accurate in communicating general building processes and the processes he was likely to follow. He found it more difficult recalling or being specific about things that actually happened in relation to this job. It is however understandable that he would have difficulty after almost 13 years recalling one job from another.

[84] There is also no reliable evidence that Mrs Sell undertook any on-site supervision. When Mr Harris was asked to give examples of Mrs Sell's on-site supervision, he could only refer to the

plumber, electrician and kitchen installer. This related to the location of lighting and electrical points, the layout of the kitchen and the style and location of internal plumbing fixtures. These were all areas in which any homeowner would have involvement even if it were a full build-supervise or a turn-key type construction. The onsite contact with the plumber, electrician and kitchen installer in this regard, are not evidence that Mrs Sell provided any onsite supervision.

[85] Where there is a conflict in the evidence between Mr Harris and Mrs Sell, in general I prefer the evidence of Mrs Sell. On the basis of the evidence, I conclude that the agreement entered into by Mrs Sell and Mr Harris was that Mr Harris would build and provide onsite supervision for the construction of the dwelling in accordance with the plans and specifications. To assist Mr Harris and to reduce cost Mrs Sell agreed to undertake the paperwork, organise the subtrades to be on site, and arrange and attend to payment of all subtrades.

[86] It is possible that Mr Harris misunderstood his role. This is however unlikely as Mrs Sell is a clear communicator and I believe it would have been quite clear in her discussions with Mr Harris as to what she was expecting. I accordingly conclude that Mr Harris did agree to build and to provide onsite supervision in relation to the construction of the house.

[87] I accept that both Mr and Mrs Sell endeavoured to get Mr Harris to provide a written contract clarifying what the contract price covered. I do not accept the explanation given by Mr Harris that he was an “old-fashioned type of guy whose word was his bond” is sufficient justification for not providing a written contract. Written contracts either for labour-only or for building supervision were standard practice in the building industry.

[88] I do not accept that the references to labour-only contractors in the specifications has any significance in determining the issue of the roles of Mr Harris and Mrs Sell. These were obviously very standard specifications/contractual documents. The contractual parts were never completed and there was room for variation as to the type of contract that could be entered into. In addition, the issue to do with builders risk insurance is also not definitive. I accept Mrs Sell's explanation that Mr Harris had instructed her to take it out. Whilst that was normally taken out by the builder, the fact Mrs Sell organised the insurance is not inconsistent with the type of arrangement she believes she had with Mr Harris.

[89] I also did not find the evidence of Mr or Mrs Freestone, or the other non-expert witnesses called by the claimant, provided any real assistance to determining this issue. The evidence of all these parties has very little weight. While Mrs Freestone was adamant in her recollections, they were based almost solely on her interpretation and/or recollection of conversations she had with Mrs Sell some 13 years previously. She was rarely, if ever, on site during the construction and what she did have firsthand knowledge of, was not necessarily inconsistent with Mrs Sell's role as Mrs Sell described it. She referred to Mrs Sell doing a lot of running around and of having a folder with her with quotes and other information in it. She was not able to provide any evidence of Mrs Sell providing any on site management or supervision.

[90] I also do not accept the evidence of Mr and Mrs Freestone in relation to a pile of dirt against the house for months or even years. Mr and Mrs Freestone's evidence was inconsistent in relation to where this pile was located. Mr Freestone said it was beside the garage near the south western corner of the house and Mrs Sell said it was by Melanie's room which is at the north eastern corner. Mrs Freestone's evidence that the pile of earth had been against the house from the time the framing was constructed is not credible.

The Legal Position

[91] The Court of Appeal in *Riddell v Porteous* [1991] 1 NZLR 1, concluded that the fact that owners of a property engaged various trades on a labour-only basis did not in itself make them head-contractors. In addition, it concluded that owners not giving sufficient attention to the work of each of the contractors, did not make them the creators of any poor workmanship but it can raise issues of contributory negligence.

[92] The Council directed me to various cases where owners have been held to have either been the head-contractor or to have some liability because they have entered into labour-only contracts. Clearly each individual case needs to be looked at in light of its individual facts. The majority of the cases referred to can be distinguished on the facts. For example, in *Abyaneh & Anor v Auckland City Council & Ors* [22 July 2008] WHT, TRI 2007-100-13 Adjudicator Lockhart QC, it is clear that Mr Abyaneh in that case was more involved in the onsite construction than was Mrs Sell. The Council's electronic record indicated that Mr Abynaeh had been in charge of the progress of the building work and personally booked inspections with the Council. He ordered and delivered materials to the site and during the construction period was on site on a regular basis having detailed knowledge of what was going on and effectively supervised construction.

[93] In *Wilson & Anor v Welch & Ors* [28 March 2008] WHT, DBH 4734, Adjudicator McConnell, Mr Welch was found to have liability as the contractor because he designed and either constructed or directed someone to construct a deck that contributed to the dwelling leaking. In addition, he reached a specific agreement with the builder that the builder was not responsible for the onsite supervision.

[94] In summary therefore, I accept that Mrs Sell obtained quotes, ordered materials, organised and paid the contractors and arranged for them to be on site at appropriate times. I also accept that she applied for the building consent and arranged insurance for the construction site. However she did not provide any on-site supervision but contracted Mr Harris to build the house and provide on-site supervision. The role Mrs Sell assumed in the construction of this house was not that of head contractor, supervisor or project manager as she was not responsible for, or in charge of, the construction side of the project. She contracted Mr Harris to build the house and supervise the construction.

[95] Mrs Sell's role in relation to the construction therefore does not negate the duty of care owed to the claimants by any of the other parties in this claim. In addition there is no evidence Mrs Sell did, or failed to do, anything that contributed to or caused the dwelling to leak in relation to her role in the initial construction work. She cannot therefore be held to have caused her own loss. Nor did her role raise issues of contributory negligence on the basis she gave insufficient attention to what was being done by each of the contractors given my conclusion that she contracted Mr Harris to provide on-site supervision.

LIABILITY OF KENNETH HARRIS – FIRST RESPONDENT

[96] The claim against Mr Harris is in both contract and tort. The claimants allege that Mr Harris was in breach of the contract to build and supervise the house and as a consequence of those breaches, the dwelling leaks. They further allege that Mr Harris owed them a duty of care and that he breached that duty of care. They submit the law allows consideration of a tortious claim as well as a contractual claim.

[97] Having found that Mr Harris was contracted to both build and supervise the onsite construction, he has responsibility not only for the work that he did but also for the work he either directly supervised, or should have supervised. Mr Harris can only be found to be negligent in his supervisory role, or be in breach of contract, if he failed to pick up issues which he should reasonably have done as the builder and onsite supervisor.

[98] In addition in order for Mr Harris to have any liability, in either tort or contract, it needs to be established that the work he undertook, or agreed to undertake, was negligent or defective. In addition it needs to be established that negligent or defective work caused or contributed to the dwelling leaking. In deciding these issues it is necessary to consider the defects as discussed in paragraphs [29] to [53].

[99] Mr Harris accepts he was responsible for the fixing of the cladding and the construction of the decks. He was not however responsible for installing the metal handrails to the decks as these were not fitted until July 1998. Mr Harris is responsible for the lack of membrane in the deck walls as well as the lack of slope on the top of the deck walls. Whilst the technical literature did not provide details of balustrade tops the experts suggested the specifications for parapets should have been followed and these did require a slope. Mr Harris also accepts he was responsible for installing the windows, and the manner of installation as well as the installation of the building paper under the head flashings have contributed to the dwelling leaking. He also accepts he was responsible for fixing the decorative weatherboards.

[100] The main area of dispute in relation to Mr Harris' involvement is whether he was responsible for the ground levels particularly in relation to the driveway and the western elevation at the rear garage. The claimants submit that Mr Harris fixed the ground levels when

laying the foundation from the datum point. Mr Harris disputes this and claims the ground levels were set by the concrete layer in laying the concrete and by Mr and Mrs Sell and/or the landscaper who undertook the landscaping work subsequent to the house being constructed.

[101] I accept that the ground levels, in terms of landscaping were set by whoever undertook the landscaping, as the land area was built up when the landscaping work was done. The concrete layer must also be primarily responsible for the level to which the concrete was laid. However, the builder or site supervisor has some liability if they did the original preparation work that determined the levels to which the driveway was dug.

[102] In this regard I accept Mrs Sell's evidence that there was contact between Mr Smith, the concrete layer and Mr Harris. Mr Harris should either have ensured the ground level preparation was appropriate for the driveway to be laid or to have ensured that Mr Smith was aware further excavation was required before laying the concrete. Whilst setting the floor levels at the beginning of the construction were not necessarily definitive to final driveway levels Mr Harris, in his supervisory role, was responsible for ensuring the driveway was set appropriately.

[103] Mrs Sell said that she believed Mr Harris or Mr Tribe constructed the retaining walls at the end of the driveway and the left of the garage. Mr Tribe and Mr Harris deny this. Mrs Sell did not see the work being done as she was unwell or in hospital at the time. Her conclusion that Mr Harris did this work is based on the fact that the work was completed during this time and she did not do it nor did she organise anyone else to do it. I accept that the assumption she made that Mr Harris either did or organised the work was reasonable. I accordingly accept that on the balance of probabilities either Mr Harris undertook this work or he arranged for someone else to do it.

Accordingly Mr Harris was responsible for any ground level issues that have resulted from the construction of these two retaining walls.

[104] I accept that in general Mr Harris is a competent builder. The experts agreed that a number of elements that have failed were built in accordance with the technical specifications and/or standard building practices. There were however a number of respects in which his workmanship did not comply with good practice of the day which have contributed to the dwelling leaking. These include:

- The failure to install a membrane in the deck walls and failure to build the walls with a sloping top.
- Various defects in the fixing of the cladding
- Building paper incorrectly installed under head flashings.
- Minor defects in installation of windows.
- Affixing decorative panels to unsealed fibre-cement cladding
- Failure to ensure site was prepared with sufficient levels before installation of the driveway.

Claim against First Respondent in contract

[105] The claimants acknowledged there was no written contract other than the record of the contract price signed by Mr Harris. There was however an oral agreement between Mrs Sell and Mr Harris that Mr Harris was to build and provide onsite supervision for the construction of the dwelling at Rukutai Street. Mr Harris also agreed that he would build the dwelling in accordance with the plans and specifications. It was, at least, an inferred term of that agreement that the construction work and supervision would be done competently and in accordance with standard building practices.

[106] The defects referred to in paragraph [104] above are work undertaken by Mr Harris in terms of the contract and are therefore in breach of the contract he had with the claimants. Mr Harris is in breach of contract and liable for the full amount ordered as set down in paragraph [150] below.

Claim in Tort

[107] The tortious claim against Mr Harris is that Mr Harris, as the builder and site supervisor owed the claimants a duty of care to ensure the house was constructed with due care and skill and in accordance with reasonable building practices. Mr Harris does not dispute he owed a duty of care but claims he did not breach any duty of care.

[108] For the reasons already outlined, I find that Mr Harris was negligent and in breach of the duty of care he owed Mr and Mrs Sell. The evidence establishes that the house is a leaky building and it did not comply with the Building Code. There are key defects in relation to the workmanship undertaken by Mr Harris that have contributed to the dwelling leaking. Whilst Mr Harris is not liable for all the defects or causes of water entry the defects for which he is responsible are evident on all elevations. For this reason I conclude that these defects combined would have required a reclad of the dwelling. I therefore conclude that Mr Harris is liable and negligent for the full amount ordered as set out in paragraph [150] below.

LIABILITY OF AUCKLAND CITY COUNCIL – SECOND RESPONDENT

[109] The claim against the Council is that it was negligent in both the processing of the building consent application and in carrying out inspections during the construction and certifying process. In

particular it is alleged that it was negligent in failing to identify the weathertightness defects in the inspections undertaken.

[110] It is well accepted that a local authority owes a homeowner a duty of care in issuing the building consent, inspecting the building work during the construction and in issuing a CCC.[1] The Council alleges that due to Mrs Sell being a head-contractor, they owe no duty of care. For the reasons already outlined I do not accept this allegation.

[111] I therefore find that the Council did owe Mr and Mrs Sell a duty of care in both the consent and inspection process. The issue therefore is whether it breached that duty of care and whether any such breach relates directly to the defects which caused damage.

Claim in relation to Building Consent process

[112] The claimants allege that there were inadequacies in the design of the dwelling and that the drawings and specifications on which the consent was based, do not contain sufficient details to ensure defects did not occur and that construction could be adequately followed. In processing the building consent application, the claimants allege the Council should have been mindful of the issues that these inadequacies raised. They therefore breached their duty of care to the claimants in approving the building consent application.

[113] In *Body Corporate 188529 & Ors v North Shore City Council & Ors* (No 3) [2008] 3 NZLR 479 (*Sunset Terraces*) Heath J concluded it was reasonable for the Council to assume, in issuing

[1] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 526-40, *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394, *Body Corporate 188529 & Ors v North Shore City Council & Ors (No 3)* [30 April 2008] HC, Auckland, CIV-2004-404-003230, Heath J ("*Sunset Terraces*").

building consents, that the work could be carried out in a manner that complied with the Code. He stated:

> "[399]…To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly co-ordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a consent had been reached.
>
> …….
>
> [403] In my view, it was open for the Council to be satisfied, on reasonable grounds, that the lack of detail was unimportant. I infer that the relevant Council official dealing with this issue at the time concluded that the waterproofing detail was adequately disclosed in the James Hardie technical information and had reasonable grounds to be satisfied that a competent tradesperson, following that detail, would have completed the work in accordance with the Code."

[114] Mr Cartwright on behalf of the claimants tried to distinguish *Sunset Terraces* as it related to a multi-unit claim rather than a stand-alone property. He submitted that with stand-alone properties there was a greater obligation on the Council to ensure that the builder had a copy of the James Hardie technical literature on site. I do not accept that this distinction needs to be made between stand-alone and multi-unit complexes. In any event, Mr Harris did have a copy of the James Hardie technical literature and the Council also had copies of all such literature in its technical library and these were available to the processing officers of the Council.

[115] In my view, the Council had reasonable grounds on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans and specifications and technical literature. I accordingly conclude that the

claimants have not proved negligence, at the building consent stage, on the part of the Council.

The Inspection Process

[116] The claim that the Council failed to exercise due care and skill when inspecting the building work is that it failed to inspect with sufficient thoroughness to identify the established defects and that this failure amounted to negligence and caused the claimants loss.

[117] The Council's inspections were carried out by Council officers pursuant to section 76 of the Building Act 1991. Five inspections were carried out during the original construction process and several more between 1998 and 2004. Whilst the final inspection ultimately failed, this was on the basis of a change of policy by the Council in relation to monolithically clad homes. The record of that inspection suggests that in all other respects the dwelling passed its final inspection and that were it not been for the change in policy, a CCC would have issued. It further appears that none of the contributing factors to the dwelling leaking were adequately identified before the final inspection.

[118] The Council submits that the standard against which the conduct of a Council officer may be measured is clear-cut and referred to in *Askin v Knox* [1989] 1 NZLR 248 where in summary Cooke P concluded that a Council officer will be judged against the conduct of other Council officers. A Council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act/omission was said to take place.

[119] The Council therefore concludes that it can only be liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed during the course of inspection. They acknowledge that the cladding embedded in the

driveway should have been detected as an inspection in either 1996/1997 or when it was called back in 1999. They accordingly accept liability in relation to that defect. They however submit that the other defects either could not have been detected by a Council officer or were not considered to be defects judged by the standards of the day.

[120] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day. The High Court however has in more recent cases placed a greater responsibility on territorial authorities than what was submitted by its counsel in this case. Heath J in *Sunset Terraces* states that:

> "[450….[A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent."

[121] And at paragraph 409,

> "The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard."

[122] In *Dicks v Hobson Swan Construction Limited* (in liquidation),[2] the court did not accept that what it considered to be systemically low standards of inspections absolved the Council from liability. In holding the Council liable at the organisation level for not ensuring an adequate inspection regime, Baragwanath J concluded:

[2] (2006) 7 NZCPR 881 per Baragwanath J (HC) at para [116].

> "[116]…It was the task of the council to establish and enforce a system that would give effect to the building code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present."

[123] I accordingly conclude that the Council is not only liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed. It can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying critical waterproofing issues.

[124] I accept there are causes of water entry to this property despite substantial compliance with the specifications and technical literature. The Council is not at fault in failing to detect these. There are however three main areas in which the work fell short of the standards of the day, which have contributed to water entry, namely:

- Ground levels;
- Installation of cladding; and
- Construction of the decks.

[125] The Council has already accepted potential liability in relation to the ground level issue as it pertains to the driveway. I however conclude the other ground level issues should also have been apparent to the Council inspector. The ground levels on the western wall of the garage were most likely established prior to the inspection in 1999 as was the retaining wall at the driveway end of the garage. These are contributing issues to the property leaking and should have been picked up by the Council inspector in 1999.

[126] In relation to the balconies and balustrades, the Council submits that the lack of membrane was not visible to the Council when it inspected in 1999. The difficulty for the Council is that the balustrades and handrails differ significantly from what was on the

plans. As there were no designs and specifications for these details in the original consent the Council should have taken further steps to satisfy itself that the work complied with the Code before signing it off. They should have made further enquiries to satisfy themselves that they had been constructed properly. In addition, before arranging for the handrails to be affixed, Mrs Sell contacted the Council officer and faxed through drawings of the proposed handrails and method of fixing. This was approved by the Council at the time. They later came back and checked the work done and passed it.

[127] I conclude that the Council was negligent in failing to ensure the balustrades and deck walls complied with the Building Act and in failing to institute a regime that was capable of identifying these waterproofing issues.

[128] There was no agreement by the experts as to which, if any, of the cladding fixing defects a Council inspector could or should have noticed. I however conclude that the Council had either not established a regime, or did not follow any regime, that was capable of identifying key waterproofing issues involving the fixing of cladding and installation of windows. Harditex cladding was an alternative solution with a specific appraisal certificate. Because of the crucial importance of appropriate fixing, inclusion of gaps and seals, appropriate vertical and horizontal joints and flashings, an inspection regime should have been established to ensure key elements were present. The Council was negligent in failing to do this.

[129] I however accept even if a more adequate inspection regime had been in place many of the issues would not reasonably have been detected because they were not considered to be problematic at the time. The Council's negligence in this regard was not a major contributing factor to the loss suffered by the claimants.

[130] I however conclude that the Council was negligent in failing to detect the significant faults in relation to the ground levels and in relation to the construction of the deck walls and handrails and to a lesser extent the cladding. The deck walls and handrails were also departures from the permitted plans. The Council appears to have missed both the defects and the departures for the plans or failed to pay any attention to them. The ground levels and decks were significant causes of water ingress and accordingly the Council's negligence was a substantial and material cause of the loss suffered by Mr and Mrs Sell.

[131] The Council argued that the areas in which they could have some liability would not have required a complete reclad and therefore they should not be jointly and severally liable for all of the claim. However, even leaving aside the issues with the cladding, the defects established against the Council are on all elevations. The driveway issues primarily affect the southern elevation but the decks are on the north and east elevations. In addition, I accept the landscaping issues that the inspections should have detected in 1999 were on the western and part of the southern elevations.

[132] I accordingly conclude that the Council is jointly and severally liable for 100% of the total damages as set out in paragraph [150] below.

LIABILITY OF KEVIN TRIBE – THIRD RESPONDENT

[133] The claim against Kevin Tribe is that as a builder employed on site, he owed the claimants a duty of care to use proper care and skill in the building of the house. It is alleged he failed to do this and as a consequence, Mr and Mrs Sell have suffered a loss.

[134] Mr Tribe accepts he owed the claimants a duty of care to exercise all reasonable skill and care in the conduct of the work he was asked to do. He however denies he breached that standard of care. He submits that in addition to the issues already discussed in this determination, the Tribunal should have regard to Mr Tribe's role on site in determining the extent of his duty of care and whether it was breached.

[135] Whilst Mrs Sell paid Mr Tribe, he was contracted by Mr Harris to assist him with the building work. He was engaged as a hammer-hand and worked under the supervision of Mr Harris, with the exception of the time Mr Harris was in India. Mr Tribe could not clearly recall exactly what work he did while Mr Harris was absent but thought it was mainly concerned with the internal fittings. From a photograph taken at the time Mr Harris went to India, it is clear that the cladding was installed by that time. Accordingly, Mr Tribe's recollection that he was primarily engaged in the internal fit-out would appear to be accurate.

[136] Mr Tribe accepts that the work he did at other times included building decks, building the cedar feature panels, installing windows and installing sheet cladding. There is evidence that there were defects in the construction or installation of these items which have caused the dwelling to leak. On the evidence presented it is however impossible to determine whether Mr Tribe personally undertook any of the defective work or not. In any event, I accept that he was working under the supervision and at the direction of Mr Harris in the work he did in installing windows, building the decks, building and affixing the cedar panels and fixing the cladding.

[137] There is accordingly no evidential basis for attributing liability for defects in key areas to Mr Tribe. I therefore conclude that Mr and Mrs Sell have not discharged the onus of proving negligence on the

part of Mr Tribe. The claim against Mr Tribe is accordingly dismissed.

LIABILITY OF GARY SMITH – FOURTH RESPONDENT

[138] Gary Smith was the contractor who laid the concrete driveway and concrete porch at the property. He did not participate in these proceedings and did not attend the hearing. He was however served with the proceedings and has been sent notices of all hearings and conferences held in relation to the claim. The case manager during the course of the proceedings called his contact number and spoke with a person who identified themselves as being Mr Smith's wife and she confirmed he had received the documents.

[139] Section 74 of the Act states that the Tribunal's powers to determine a claim are not affected by the failure of a party to participate in the proceedings. Section 75 also allows the Tribunal to draw inferences from a party's failure to act and to determine a claim based on the available information.

[140] The claim against Mr Smith is in tort and is that he failed to exercise reasonable care and skill in the construction of the driveway and that this is a material cause of the dwelling leaking and the loss suffered by the claimants.

[141] It is accepted that the cladding being embedded into the driveway was a material cause of the dwelling leaking and therefore the loss subsequently suffered by the claimants. As the contractor installing the driveway Mr Smith was primarily responsible for the finish levels of the driveway. Mr Smith was therefore negligent in laying the concrete so that there was a lack of adequate separation between the garage at floor level and the driveway paving and a lack of clearance at the bottom of the cladding.

[142] The general consensus between the experts however was that if the driveway levels had been the only defect a full reclad would not have been required. There would still however needed to have been significant remedial work and probably the recladding of at least one elevation. The driveway primarily affected the southern side of the garage and the south-west corner of the house. I accordingly assess Mr Smith's joint and several liability to be for 25% of the amount claimed.

CONTRIBUTORY NEGLIGENCE

[143] I have already concluded that there is no contributory negligence on the basis of Mrs Sell's involvement in the original construction. I have also concluded that maintenance was not a significant contributing issue to the dwelling leaking and accordingly no deductions for contributory negligence should be made in this regard.

[144] The claimants however were involved in finishing the house after January 1997 and there are two issues that they either undertook or arranged to get done which has contributed to the house leaking. These are:

- The installation of the metal handrails on the decks; and
- Landscaping work setting ground levels.

[145] Mr and Mrs Sell did not personally install the handrail to the decks. They obtained quote from various suppliers and then spoke with the Council and faxed a copy of the proposed design to the Council. They received confirmation back from the Council that this design was adequate. They then went ahead and got the work done.

When it was completed they arranged a Council inspection that signed off the work.

[146] Accordingly whilst the manner in which the handrails were installed has been a significant contributing issue to the house leaking Mr and Mrs Sell were not negligent in this regard. They engaged professionals to do the work and got both the method of installation approved by the Council before getting the work done. They also got it checked off by the Council inspector on completion. I accordingly conclude that the respondents have failed to establish that there was any contributory negligence on the part of Mr and Mrs Sell in relation to the installation of the handrails.

[147] I however accept that Mr and Mrs Sell either carried out some of the landscaping work or engaged contractors to do this at their instruction. I do not accept the claimants' submission that the ultimate ground levels of landscaping work particularly around the north, east walls and the eastern part of the southern wall were set by Mr Harris when laying the foundations and floor levels. The ground levels were built up higher after construction ended.

[148] The courts have concluded that owners who carry out work or who fail to give sufficient attention to what is actually done by contractors engaged by them, whilst not the creator of the contractors' workmanship, may be guilty of contributory negligence.[3] The law in relation to contributory negligence is also relatively clear. Damages may be reduced where the claimants' negligence has contributed to, or partially caused, their loss. Where a claimant has been negligent, a court or tribunal may apportion loss by reducing the quantum of damages awarded to the claimants.[4] There however

[3] *Riddell v Porteous* (supra).
[4] *Day v Mead* [1987] 2 NZLR 433 (CA).

needs to be a "relative blameworthiness" and a causal link between the claimants and the respondents' negligence.[5]

[149] I accept that Mr and Mrs Sell have contributed to their loss by the landscaping work they had done on the property. The landscaping work for which they were responsible was not on all elevations and there was no agreement that it was a significant contribution. There should therefore not be a significant reduction for contributory negligence. I conclude that the reduction of the damages awarded on the basis of the claimants' contributory negligence should be set at 10% of the total amount established.

CONCLUSION ON QUANTUM

[150] I accordingly conclude that Mr and Mrs Sell have established their claim to the extent of $202,100.23 which is calculated as follows:

Remedial costs	$188,505.04
Interest	$11,050.77
General damages	$25,000.00
Sub-Total	$224,555.81
Less 10% for contributory negligence	$22,455.58
Total Established	$202,100.23

CONTRIBUTION ISSUES

[151] The Tribunal has found that the first, second and fourth respondents breached the duty of care they each owed to the claimants. Each of the respondents is a tortfeasor or wrongdoer, and

[5] *Sunset Terraces* and *Hartley v Balemi & Ors* [29 March 2007] HC, Auckland, CIV 2006-404-002589, Stevens J).

is liable to the claimants in tort for their losses to the extent outlined in this decision.

[152] Section 92(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[153] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[154] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

[155] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable shall be such as maybe found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[156] As a result of the breaches referred to above the first and second respondents are jointly and severally liable for the entire amount of the claim and the fourth respondent is liable for 25% of the claim. This means that they are concurrent tortfeasors and therefore each is entitled to a contribution towards the amount they are liable

for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

[157] It has been well established that the parties undertaking the work should bear a greater responsibility than the Council. In recent cases the apportion attributed to the Council has generally been between 15% and 25%. There are no specific circumstances in this claim which dictate a greater or lesser amount should be awarded in this case and accordingly I set the Council's contribution at 20%. The contribution of the fourth respondent Mr Smith is set at 15% as the work he did was the dominant cause of damage in relation to the driveway area.

[158] I therefore conclude that the first respondent, is entitled to a contribution of 35% from the second and fourth respondents in respect of the amount for which he has been found jointly liable. The second respondent is entitled to a contribution of 80% from the first and fourth respondents and the fourth respondent is entitled to a contribution of 10% from the first and second respondents.

CONCLUSION AND ORDERS

[159] The claimants' claim is appropriate to the extent of $202,100.23. For the reasons set out in this determination I make the following orders:

[160] Kenneth Harris is ordered to pay Richard & Renee Sell the sum of $202,100.23 forthwith. Kenneth Harris is entitled to recover a contribution of up to $70,735.09 from the Auckland City Council and Gary Smith for any amount paid in excess of $131,365.14.

[161] Auckland City Council is ordered to pay Richard & Renee Sell the sum of $202,100.23 forthwith. Auckland City Council is

entitled to recover a contribution of up to $161,680.18 from Kenneth Harris and Gary Smith for any amount paid in excess of $40,420.05.

[162] The claims against Kevin Tribe are dismissed.

[163] Gary Smith is ordered to pay Richard and Renee Sell the sum of $50,525.05 forthwith. Gary Smith is entitled to recover a contribution of up to $20,210.01 from Kenneth Harris and the Auckland City Council for any amount paid in excess of $30,315.04.

[164] To summarise the decision, if the three respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

First Respondent	$131,365.14
Second Respondent	$40,420.05
Fourth Respondent	$30,315.04
Total amount of this determination	$202,082.23

[165] However the first, second and fourth respondents fail to pay their apportionment, the claimants can enforce this determination against any respondent up to the total amounts they are ordered to pay in paragraphs 160, 161 and 163 respectively.

DATED this 13th day of May 2009

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P A McConnell
Tribunal Chair